

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____ ELOUISE PEPION COBELL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96CV01285
)	(Judge Lamberth)
GALE A. NORTON, Secretary of the)	
Interior, et al.,)	
)	
Defendants.)	
_____)	

**DEFENDANTS' OPPOSITION TO
(1) PLAINTIFFS' MOTION FOR EXPEDITED CONSIDERATION
OF DEFENDANTS' MOTION TO STAY THE COURT'S
STRUCTURAL INJUNCTION PENDING APPEAL; AND
(2) PLAINTIFFS' CONSOLIDATED MOTION TO CONSTRUE
DEFENDANTS' MOTION TO STAY THE COURT'S STRUCTURAL
INJUNCTION AS MOTION TO AMEND TIMETABLES IN THE
STRUCTURAL INJUNCTION AND REQUEST FOR DECLARATION**

Defendants respectfully submit this memorandum in opposition to Plaintiffs' Motion For Expedited Consideration Of Defendants' Motion To Stay The Court's Structural Injunction Pending Appeal (Nov. 13, 2003) ("Plaintiffs' Motion for Expedited Consideration") and Plaintiffs' Consolidated Motion To Construe Defendants' Motion To Stay The Court's Structural Injunction As Motion To Amend Timetables In The Structural Injunction And Request For Declaration That The Interior Defendants Violated The Structural Injunction Prior To November 10, 2003 (Nov. 17, 2003) ("Plaintiffs' Motion to Construe").¹ These motions were filed in defiance of an administrative stay imposed by the Court of Appeals and warrant summary denial.

¹ Plaintiffs filed a Notice of Errata with respect to their Motion to Construe on November 17, 2003.

DISCUSSION

On November 12, 2003, the Court of Appeals issued an order "that the district court's order issuing structural injunction filed September 25, 2003, be stayed pending further order of the court." Cobell v. Norton, No. 03-5314 (D.C. Cir. Nov. 12, 2003).² In spite of the stay imposed by the appellate court, Plaintiffs immediately filed a motion asking this Court to issue its own stay ruling on an expedited basis. See Plaintiffs' Motion for Expedited Consideration. Less than one week later, in tacit recognition of the impropriety of their earlier motion, Plaintiffs filed another motion asking the Court to rule on Defendants' stay motion by treating it, not as a stay motion, but as a request for additional time to comply with the structural injunction. See Plaintiffs' Motion to Construe. This transparent attempt to circumvent the authority of the Court of Appeals should be rejected out of hand.

This Court could not grant the relief Plaintiffs seek -- the denial of a stay of the structural injunction order -- without running afoul of the directive issued by the Court of Appeals staying that order. Plaintiffs have put forth no authority for their remarkable contention that this Court may rule on an issue that is the very subject of a binding appellate order, and none exists. The structural injunction has been stayed; so long as the stay is in effect, this Court is without power to issue its own rulings concerning the appropriateness of such a stay.

Even if Plaintiffs were correct in their contention that this Court could issue its own stay decision with respect to the structural injunction after it is stayed by the Court of Appeals, the

² The appellate court's order was issued in response to Appellants' Motion For Stay Pending Appeal (Nov. 10, 2003), and effectively made moot a similar motion Defendants filed with this Court. See Defendants' Motion To Stay The Court's Structural Injunction Pending Appeal (Nov. 10, 2003).

grounds Plaintiffs proffer in support of their motions are wholly deficient to support such a position. Although less than clear, Plaintiffs' Motion for Expedited Consideration appears to be based on the argument that the mere filing by Defendants of a motion to stay constitutes a "palpable" (but undefined) breach of their trust duties. See Plaintiffs' Motion for Expedited Consideration at 3. Frivolous on its face, the two pages of text in Plaintiffs' motion lack any explanation as to how the act of filing a motion could constitute such a breach, and are barren of any substantive discussion of the legal issues that have been presented by the motion to stay.

Plaintiffs' Motion to Construe is no more compelling. A convoluted hodgepodge of nonsensical arguments and unsupportable allegations, it is virtually impossible to decipher. See, e.g. Plaintiffs' Motion to Construe at 2 n.2 (arguing that the new law is unconstitutional based on a fictitious quote attributed to a Supreme Court Justice);³ id. at 4 (alleging litigation misconduct by Defendants based on the mere filing of their stay motion);⁴ id. at 4 n.5 (suggesting that the Court hold the "White House" in contempt); id. at 5 (arguing that Defendants' stay motion should be construed as a motion for an extension of time because, inter alia, Defendants "did not request that [their] motion filed with this Court to stay the Structural Injunction be construed otherwise."); id. at 5 (alleging that the Secretary has withheld information from the Court with

³ Plaintiffs declare that, in the Supreme Court's decision in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), "Justice Scalia . . . warns that '[l]egislative attempts to reopen final judgments represent a direct assault on Article III . . .'" Plaintiffs' Motion to Construe at 2 n.2. The language Plaintiffs ascribe to Justice Scalia appears nowhere in that decision.

⁴ Plaintiffs' motions are replete with the usual ad hominem attacks that now routinely supplant substantive legal discussion in their filings.

respect to a fictitious "request to amend by elimination");⁵ id. at 7 n.12 (arguing that recently enacted legislation is unconstitutional based on a press release issued by a Member of Congress). Insofar as can be ascertained, Plaintiffs appear to argue that Defendants failed to comply with Section IV(C)(5) of the structural injunction order, which requires Defendants to "inform the Court immediately if they receive any information that might affect their compliance with the [injunction's] timetable." See Plaintiffs' Motion to Construe at 5; Order Issuing Structural Injunction at IV(C)(5) (Sept. 25, 2003). This position is untenable on its face. Within hours of the President's signing of the legislation precluding Defendants from complying with the structural injunction, Defendants informed the Court of the new law and its effect on the injunction through the motion to stay. Plaintiffs' suggestion that this notice was somehow deficient because it was not in the form of a "request to amend by elimination the timetables" is wholly made up and has no support in the structural injunction order. Thus, even if the stay imposed by the Court of Appeals did not, by definition, preclude the relief that Plaintiffs seek from this Court, Plaintiffs have provided no foundation for such relief to issue.

⁵ The false and illogical contention that Defendants have withheld information relevant to a motion that has not been made apparently also serves as the basis for Plaintiffs' "Request for Declaration" that Defendants violated the structural injunction. See Plaintiffs' Motion to Construe at 6, 8. This unsupportable claim should be rejected.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court issue an order denying Plaintiffs' Motion for Expedited Consideration and Plaintiffs' Motion to Construe.

Dated: November 26, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Associate Attorney General
PETER D. KEISLER
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

/s/ John T. Stemplewicz
SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLIEWICZ
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

CERTIFICATE OF SERVICE

I hereby certify that, on November 26, 2003 the foregoing *Defendants' Opposition to (1) Plaintiffs' Motion for Expedited Consideration of Defendants' Motion to Stay the Court's Structural Injunction Pending Appeal; And (2) Plaintiffs' Consolidated Motion to Construe Defendants' Motion to Stay the Court's Structural Injunction as Motion to Amend Timetables in the Structural Injunction and Request for Declaration* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston